Supreme Court, U.S.
FILED
MAY 27 1998
OFFICE OF THE CLERK

No. 97-1747

In The

Supreme Court of the United States

October Term, 1997

NORTH LAWRENCE COMMUNITY SCHOOL CORPORATION,

Petitioner,

vs.

MARY M., as Parent and Next Friend for DIANE M., a minor
(names are pseudonyms),

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Michael K. Sutherlin
Counsel for Respondents
Counsel of Record
1300 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 634-6313

16 pp

QUESTION PRESENTED

Whether elementary school students who have suffered from sexual battery at the hands of an employee of a school corporation should have to prove, as an element of a Title IX claim of "hostile environment" sexual harassment, that the harassment suffered was "unwelcome"?

PARTIES TO THE PROCEEDING

The petition for writ of certiorari neglects to describe the parties to this appeal.

The Respondents are, and at all times mentioned herein were, citizens of the United States of America and were at all times residents of Lawrence County, state of Indiana. Respondent Diane M. was the minor child of Respondent Mary M. at the times mentioned herein. She has since attained the age of majority Respondents submit this brief under fictitious names to protect the privacy and identity of the minor plaintiff due to the nature of the cause of action which involves sexual abuse and statutory rape of a minor.

Petitioner North Lawrence School Corp. is a school corporation which is duly chartered in Lawrence County, State of Indiana. The school corporation is governed by a board which exercises its governmental power pursuant to state law.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinion Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 1

A. Statement of Facts 1

B. Prior Proceedings 3

Reasons for Denying the Writ 4

A. There Is No Conflict Among The Circuits As To Whether An Elementary School Student Lacks The Capacity To "Welcome" Sexual Behavior 4

B. The Seventh Circuit's Holding That An Elementary School Student Should Not Have To Prove That The Harassment She Suffered Was "Unwelcome" Is In Accord With Indiana's Laws and Public Policy 9

Conclusion 11

TABLE OF AUTHORITIES

Contents

Page

Cases Cited:

Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399 (1986) 5-6

Kinman v. Omaha Public School District, 94 F.3d 463 (8th Cir. 1993) 7-8

Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) 7

Statutes Cited:

20 U.S.C. § 1681 3

20 U.S.C. § 1681(a) 1

28 U.S.C. § 1983 3

42 U.S.C. § 1983 4

Other Authorities Cited:

Federal Register, Vol. 62, No. 49, p. 12034, Thursday, March 13, 1997 8-9

Ind. Code § 35-42-4-3 ..... 6, 7, 8

511 IAC 6-1-1(h) 10

Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1 6

OPINION BELOW

The petition accurately cites the opinion below.

STATEMENT OF JURISDICTION

The petition accurately states the basis for jurisdiction.

RELEVANT STATUTORY PROVISIONS

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), states in relevant part:

> No person in the United States, shall, on the basis of sex, be excluded in participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial Assistance. . . .

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner's Statement of Facts seriously mischaracterizes the record on several points and requires clarification. First, as the record demonstrates, the Court of Appeals correctly stated that Andrew Fields (Fields) initiated the flirtation between the two in the school cafeteria. Vol. III-775, Diane M. Direct. Diane M. responded to the twenty-one-year-old school employee's approaches, but Fields initiated the relationship. Vol. III-785, Diane M. Direct.

Second, the relationship between Fields and Diane M. was known to Diane's fellow students and the staff at Bedford Junior High School, but not to her

parents. On May 7, 1993, Fields and Diane M. attended a school-sponsored dance at Bedford Junior High School together. Vol. I-174, Pounds Direct. Fields was present ostensibly to serve as a chaperone (Vol. I-174, Pounds Direct), but he was never given official permission to serve in that capacity by a school official and was actually accompanying Diane M. to the dance. Vol I-182, Pounds Direct. Although there were numerous (estimates range from seventeen to twenty-one (17-21)) school employees present, none did or said anything about a twenty-one year old school employee spending two hours at a junior high school dance with a thirteen-year-old. Vol. IV-833, Diane M. Direct. Following the dance, Andrew and Diane became the talk of the eighth grade. Vol. IV-846, Diane M. Direct.

In addition, school officials had prior knowledge of Diane M. and Fields' plans to spend the day together on Friday, May 21, 1993. On Thursday, May 20, 1993, a student told Mr. Pounds, the principal of Bedford Junior High School, that Diane was going to skip school the following day and spend the day with Fields. Vol. I-186-87, Pounds Direct. Mr. Pounds also received a call from the school system's Director of Transportation, Mr. Wendell Bailey, on May 20. Vol. I-196, Pounds Direct. Mr. Bailey reported that a bus driver had heard from the students that Diane M. was going to skip school the following day. Vol. I-197, Pounds Direct.

Waiting to determine that Diane M. was not in class and Andrew was not at work on Friday, May 21, Pounds telephoned Diane's mother and advised her only that Diane had skipped school and might be spending the day with an unnamed male. Vol. I-208-209, Pounds Direct. Pounds suspected that the two would engage in sexual activity if they skipped school together. Vol. I-211-12, Pounds Direct.

Fields was fired following the incident. Vol. II-496, Turner Direct. He was convicted of child molestation, a Class C felony at that time, and was sentenced to six years incarceration, with two years executed and four years suspended. Vol. IV-967, Fields Direct. Fields actually served only one year of his sentence, being released pursuant to Indiana good time credit rules. With the exception of Fields, the school board failed to take disciplinary action against any of its employees who were involved in this matter.

B. Prior Proceedings

On October 24, 1994, Respondent Mary M. brought this suit on behalf of her daughter, Respondent Diane M., in the Southern District of Indiana, New Albany Division, based upon a violation of Title IX of the Educational Amendment Act of 1972, 20 U.S.C. 1681, and 28 U.S.C. 1983, against the following Defendants: Andrew Fields, individually and as an employee of the North Lawrence Community School Corporation ("NLCSC"), Jimmy R. Pounds, individually and in his official capacity as the principal of the Bedford Junior High School of the NLCSC, James Peck, individually and in his official capacity as superintendent of the NLCSC, Dr. Deborah Craton, Eva Smith, Jim Pittman, Richard Tallman, Gene McCraken, Rodney Fish and C. Dale Robinson, in their official capacity as board members of the North Lawrence Community School Corporation Board, Carol Powell, individually and in her official capacity as a school counselor for Bedford Junior High School, the North Lawrence Community School Corporation School Board and the North Lawrence Community School Corporation. Mary M. sought compensatory and punitive damages against all of the defendants.

On November 1, 1995, the District Court dismissed the School Board and the School Board Members from the suit. On April 2, 1996, the District Court granted partial summary judgment to the individual defendants and dismissed the 42 U.S.C. § 1983 claims. On the eve of trial, Fields settled with the Respondents. A jury trial was conducted on October 21-28. The jury returned a verdict in favor of the Respondents and against the Defendant on the issue of liability. However, the jury awarded zero (0) compensatory and zero (0) punitive damages to Diane M. On November 8, 1996, the Respondents moved to Question and Interview the Jurors on the Record or in the Alternative, to Personally Interview the Jurors and Move for a New Trial pursuant to Fed. R. Civ. P. 59. The District Court denied this Motion in all respects on January 6, 1997.

The Respondents then appealed to the United States Court of Appeals for the Seventh Circuit. On December 12, 1997, the Seventh Circuit reversed the judgment of the District Court and remanded the case for a new trial. The Seventh Circuit held that Diane M. could not welcome Fields' advances per se, and the District Court's Instruction No. 13 only served to prejudice the jury against her. Petitioner's Motion for Rehearing was denied by the Seventh Circuit on January 23, 1998.

REASONS FOR DENYING THE WRIT

The decision below, reversing that of the District Court, is correct. There is no conflict or any other compelling reason for review of the case by this Court.

A. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN ELEMENTARY SCHOOL STUDENT LACKS

THE CAPACITY TO "WELCOME" SEXUAL BEHAVIOR

Petitioner unsuccessfully argues that "welcomeness" is a necessary element of every Title IX sexual harassment claim. This position is unsupported by the decisional law of the circuits, and it is also in conflict with Indiana law and public policy. The Court of Appeals' decision below is fully consistent with law from other circuits and is supported by Federal regulations. In addition, this standard is less cruel to child-plaintiffs and more consistent with Indiana's public policy than the standard proposed by Petitioner.

The state of the law governing sexual harassment of students by school employees pursuant to Title IX is clear, and Petitioner's attempts to import elements of Title VII into the context of education are inappropriate. Elements of Title VII law have provided useful guidance to the courts for adjudicating Title IX cases in the past, but there are limits to its applicability in the context of sexual harassment of student-plaintiffs by adults. As the Seventh Circuit correctly stated in its opinion, children may not even understand that a school employee is harassing them, and may not even know how to say no to such advances. *See* 131 F.3d 1220, 1227. Furthermore, employers owe no affirmative duties of care to their employees, but schools must act affirmatively to protect their students from harm because they stand *in loco parentis*. *Id.* at 1226-27. Thus, Title VII cases have limited applicability in the Title IX context.

For example, respondent cites this Court's opinion in the case of *Meritor Savings Bank v. Vinson*, which holds that plaintiffs in Title VII

employment discrimination cases are required to demonstrate that sexual advances were "unwelcome" as an element of their claim. 477 U.S. 57, 68 (1986). In that case, an adult employee at a bank was sexually harassed by her supervisor, and the Court held that the plaintiff could press a claim for "hostile environment" sexual harassment. 477 U.S. at 66-67. The circumstances of *Vinson* have very little to do with the case at bar, in which a thirteen (13) year-old junior high school student was harassed and sexually assaulted by a twenty-one (21) year old while school officials did nothing to prevent the assault. *Vinson* was formulated to decide a case between two adults, and so its applicability here is very limited, as the Seventh Circuit correctly recognized. *See Mary M.*, 131 F.3d at 1226.

Even in the context of Title IX alone, principles of law cannot apply to all student-plaintiffs in the same manner. The majority of Title IX sexual harassment cases involve claims made against school employees by high school students. Sexual harassment claims by thirteen -year-old junior high school students against school employees are much rarer. The age difference between junior high and high school students may seem insignificant, but the laws of a majority of the states place great emphasis on the difference in maturity levels between children in their early and late teenage years.[1] Thus, courts must examine each Title

---

[1] The Indiana legislature holds that persons under the age of sixteen cannot consent to sexual intercourse, thus indicating that the legislature perceives a major difference in the maturity levels between junior high and upper-level high school students. See Ind. Code § 35-42-4-3. Thirty (30) states have stated that sixteen is the age at which minors gain the legal capacity to consent to sexual activity. *See* Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 136-140 (1997).

IX claim carefully and avoid dogmatic application of formulaic tests.

With this principle of case-specific analysis in mind, it is clear that there is no conflict among the circuits on the issue of "welcomeness," contrary to Petitioner's assertions. Petitioner indicates that the case of *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996), supports the principle that all student-plaintiffs must demonstrate "unwelcomeness" as part of a Title IX claim, but that case is clearly inapplicable here. In *Seamons*, a high school sophomore was tied to a bar in the boys' locker room by his fellow students while he was naked. *Id.*, at 1230. In the case at bar, the harm to Diane M. was directly inflicted upon her by an adult employee of the school. Most importantly, the key issue in *Seamons* was whether the conduct towards the plaintiff was sexually discriminatory at all, and not whether the conduct was unwelcome. *Id.* at 1233. Thus, the Court of Appeals' decision in this case does not conflict with Tenth Circuit law, and Petitioner's attempt to transform unrelated cases into precedent on this point is unconvincing.

The case of *Kinman v. Omaha Public School District*, 94 F.3d 463 (8th Cir. 1993) also fails to provide evidence of a conflict among the circuits. The plaintiff in *Kinman* was a high school sophomore, not an eighth grader, and there is a significant age difference between a high school sophomore and a thirteen-(13)-year-old eighth grader, according to the age of consent laws of a majority of the states. The plaintiff in *Kinman* may have possessed the legal capacity to consent to sexual activity, thus rendering it more reasonable to require the student-plaintiff to prove "unwelcomeness." Under Indiana law, Diane M. lacked the capacity to legally acquiesce **in any way** to sexual intercourse. Holding that Diane M. must

demonstrate that the sexual harassment she suffered was "unwelcome" would actually create a conflict with Indiana law, as the Court of Appeals recognized. It would mean that while Diane lacked the legal capacity to consent in a criminal context, she would possess the legal capacity to welcome sexual activity in a civil context. *See Mary M.*, 131 F.3d 1220. Thus, *Kinman* is factually inapplicable to this case, and fails to manufacture a conflict among the circuits, as Petitioner had intended.

Finally, the Office of Civil Rights guidelines cited by Respondent do **not** state that unwelcomeness is a necessary component of every Title IX claim, as Petitioner asserted. The "Sexual Harassment Guidance" ("Guidance") published in the Federal Register, vol. 62, No. 49, p. 12034, Thursday, March 13, 1997, actually states that plaintiffs such as Diane M. need not demonstrate "unwelcomeness" as part of their claim. In regard to the question of "welcomeness," the Guidance states:

> **If elementary students are involved, welcomeness will never be an issue.** OCR will never view sexual conduct between an adult school employee and an elementary school student as consensual. In cases involving secondary students, there will be a strong presumption that sexual conduct between an adult school employee and a student is not consensual.

Thus, the "Guidance" actually indicates that "unwelcomeness" is assumed in cases involving younger students and need not be proven because the

students lack capacity **per se** to agree to the conduct or recognize the offensive nature of the conduct.

According to the "Guidance," the crucial distinction in Title IX sexual harassment cases for the purposes of "welcomeness" is between elementary and secondary (i.e., high school) students, not elementary and "junior high school" students. *Id.*. at 12040. Since Diane M. was finishing her eighth grade year when the sexual battery occurred, she must be considered an elementary student, not a "secondary" student, and is therefore not required to demonstrate "welcomeness" under the OCR guidelines.

B. THE SEVENTH CIRCUIT'S HOLDING THAT AN ELEMENTARY SCHOOL STUDENT SHOULD NOT HAVE TO PROVE THAT THE HARASSMENT SHE SUFFERED WAS "UNWELCOME" IS IN ACCORD WITH INDIANA'S LAWS AND PUBLIC POLICY

Since the issue raised by the petition is strongly connected with Indiana's designated age of consent laws (and Petitioner's federal cases are wholly inapplicable), this Court should examine Indiana law to be sure that no conflicts with state law and public policy are created by the Petitioner's proposed standard. As stated above, Indiana Code § 35-42-4-3 states that a person under age 16 lacks legal capacity to consent to sexual activity. As the Court of Appeals properly recognized, it would be inconsistent in the extreme to hold that a thirteen (13) year old cannot consent to sex under Indiana state criminal law but can "welcome" sex in the context of Title IX lawsuits. *See Mary M..*, 131 F.3d at 1227.

Furthermore, Indiana has demonstrated a strong interest in protecting children from sexual assault and the traumas arising out of the assault. The Indiana legislature has actually amended Indiana Code § 35-42-4-3 twice (in 1994 and 1996) since Fields was convicted, and the conduct for which Fields was convicted is now a Class A felony in Indiana. Any rule which would force victims of assault to submit to psychologically scarring investigations of their conduct violates Indiana public policy.

The opinion below is consistent with Indiana law and public policy on several levels. First, the Indiana Administrative Code defines "elementary school" as "**any** combination of grades kindergarten (K) through eight (8). *See* 511 IAC 6-1-1(h). Even if other IAC regulations distinguish between elementary, junior high, and high school students, the IAC implies that "middle school" students should be treated as elementary students, not high school students, if such a distinction must be made. Thus, for Title IX purposes, Diane M. should be treated as an elementary school student under the law, and she should not be required to prove "unwelcomeness" as part of her claim.

In addition, as long as a minor student-plaintiff has to demonstrate "unwelcomeness" as a part of his or her claim, he or she will be subject to inquisitorial examinations regarding his or her reactions to the sexual conduct in question. Such questioning will only prejudice and confuse the jury against child-plaintiffs and inflict great psychological trauma on them during trials. As the Court of Appeals noted, this result actually occurred in Diane M.'s case. *See Mary M.* at 131 F.3d at 1227. During Fields' trial for the rape

of Diane M., no one would have asked Diane whether she "asked for it" or whether she was wearing a "sexy dress." In this case, the NLCSC was allowed to ask Diane those types of questions during its trial because the District Court erroneously required Diane M. to prove "unwelcomeness." Such a requirement is in conflict with state law and against Indiana's public policy of protecting children from sexual assault and damaging questioning at trial. If a thirteen (13) year old lacks capacity to consent to sexual activity **per se**, then she should also lack capacity to "welcome" sexual activity **per se**.

CONCLUSION

The petition for a writ of certiorari is based upon misstatement of the facts and distortion of the law, and raises no issues worthy of review by this Court. The petition should therefore be summarily denied.

Respectfully submitted,

Michael K. Sutherlin
Counsel for Respondents
Counsel of Record
1300 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204
(317) 634-6313